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IN THE SUPREME COURT OF THE UNITED STATES

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KOUICHI TANIGUCHI, :

Petitioner : No. 10-1472

v. :

KAN PACIFIC SAIPAN, LTD. :

- - - - - x

Washington, D.C.

Tuesday, February 21, 2012

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:14 a.m.

APPEARANCES:

MICHAEL S. FRIED, ESQ., Washington, D.C.; on behalf of
Petitioner.

DAN HIMMELFARB, ESQ., Washington, D.C.; on behalf of
the Respondent.

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1 P R O C E E D I N G S

2 (11:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-1472, Kouichi Taniguchi v. Kan
5 Pacific Saipan, Limited.

6 Mr. Fried.

7 ORAL ARGUMENT OF MICHAEL S. FRIED

8 ON BEHALF OF THE PETITIONER

9 MR. FRIED: Mr. Chief Justice, and may it
10 please the Court:

11 Our brief lists -- lists six categories of
12 authority demonstrating that the work of an interpreter
13 under 28 U.S.C. section 1920(6) is limited to spoken
14 communication. Primary among these is the Court
15 Interpreters Act itself, whose central provisions afford
16 simultaneous or consecutive spoken interpreter services.
17 When --

18 JUSTICE SOTOMAYOR: Can I make sure that I
19 understand the extent of your argument? Are you saying
20 that it's interpretation, oral interpretation, just in
21 the courtroom?

22 MR. FRIED: Well, Justice Sotomayor, I think
23 that it's a -- that there is a textual ambiguity in the
24 statute about the extent of covered spoken interpreter
25 services. One could argue it either way, and we

1 don't -- I am happy to proceed under either assumption.
2 But what is clear is that, however far it extends within
3 the area of spoken interpretation, document translation
4 is --

5 JUSTICE SOTOMAYOR: I -- I have to say that
6 if you read it the way you do, then what you are
7 suggesting is that for appointed experts, they only get
8 recompensed for the time they're testifying, because
9 that's the only time they spend in court.

10 MR. FRIED: Court-appointed experts, Your
11 Honor?

12 JUSTICE SOTOMAYOR: Yes.

13 MR. FRIED: I think the legislative history
14 of that seems to indicate that that provision was
15 actually inserted into 1920(6) for a separate
16 housekeeping reason, because it parallels Rule 706 of
17 the Federal Rules of Evidence, which was a preexisting
18 rule addressing court-appointed experts, and simply put
19 it into the enumeration.

20 JUSTICE SOTOMAYOR: But court experts get
21 a -- get paid for their prep work.

22 MR. FRIED: Yes, Your Honor. I -- I think
23 that -- that that may well be the case. But I -- I
24 think that the --

25 JUSTICE SOTOMAYOR: Could I -- one further

1 question.

2 MR. FRIED: Of course.

3 JUSTICE SOTOMAYOR: I take all your
4 arguments, but I read the common dictionary and there is
5 no question that the primary meaning of "interpreter" is
6 interpretation of oral languages. But the dictionary is
7 broad enough to include translation work as well.

8 Given that the courts for 70 years have been
9 awarding, most of the them -- except for I think the
10 Seventh here, virtually every court over a 70-year
11 period has been awarding translation fees as -- as
12 authorized; why shouldn't that be enough for us?

13 MR. FRIED: Well --

14 JUSTICE SOTOMAYOR: Meaning, if the
15 dictionary term is broad enough and that's what the
16 courts have been doing and the world hasn't crashed,
17 despite one case where a large amount was given -- your
18 adversary points to the fact that most of the
19 translation fees tend to be fairly reasonable -- why
20 should we muck with what works?

21 MR. FRIED: Well, Your Honor, I think
22 that --

23 JUSTICE SOTOMAYOR: I think I am drawing --
24 I am drawing from ways that my colleague next to me
25 usually asks a question.

1 (Laughter.)

2 MR. FRIED: Your Honor, I think the primary
3 reason why the Court should -- should not adopt that is
4 because it's -- it's inconsistent with the text.

5 JUSTICE SCALIA: It's wrong is your answer,
6 right?

7 MR. FRIED: Yes, Your Honor.

8 And -- and it's also worth noting that the
9 courts -- none of the courts of appeals who have adopted
10 this construction of 1920(6) have considered or
11 addressed our primary arguments in this case. They
12 haven't addressed the uniform professional literature
13 addressing this -- this topic, the dictionaries in their
14 aggregate, the Administrative Office's interpretation of
15 this statute, the consistent congressional distinction
16 between written translation and spoken -- spoken
17 interpretation that runs throughout the code.

18 JUSTICE KAGAN: Just out of curiosity, why
19 do you think that all these courts just took for granted
20 the opposite reading?

21 MR. FRIED: Well, Your Honor, I'm -- I'm --
22 I'm not sure that I have a -- a good answer to that.
23 I -- perhaps that they weren't presented with some of
24 these -- these arguments and didn't have the opportunity
25 to consider them.

1 JUSTICE SCALIA: Perhaps it was
2 Dr. Johnson's answer when a lady pointed out an error in
3 his dictionary and his answer was: "Stupidity, madam,
4 sheer stupidity."

5 (Laughter.)

6 MR. FRIED: I think -- I think, Your Honor,
7 that -- that Kan Pacific disputes very little of -- of
8 our central argument. Their discussion --

9 JUSTICE BREYER: There are -- there are lots
10 of regions of the country, Puerto Rico for example,
11 where there are vast numbers of documents that have to
12 be translated if you go into Federal court, not
13 necessarily in the Commonwealth court. That's expensive
14 to people. And they might have thought for a long time,
15 while that expense won't go away, it's at least better
16 to have it paid by the loser than to have it paid by the
17 winner. So that's been the common practice.

18 I don't think that's a foolish approach.
19 And you can find language in this, which is to go
20 back -- to go back to Justice Sotomayor --

21 MR. FRIED: Well, Your Honor, I think
22 that -- again, the -- the best reason to reject that
23 view is because it doesn't make a coherent whole of this
24 statute. These provisions operate together in a uniform
25 set of -- as a uniform set of policies for addressing a

1 common subject.

2 And the way they -- these provisions
3 interact in broad strokes that makes perfect sense in
4 our reading is that in the -- in the primary class of
5 cases that motivated the passage of this statute, namely
6 cases brought by the government where there were
7 significant constitutional confrontation clause concerns
8 about criminal defendants not understanding the spoken
9 proceedings, in those core class of cases the Congress
10 elected to pay for spoken interpreter services directly
11 in the first instance.

12 Now, in the non-core class of cases
13 litigation, private civil litigation; the Congress
14 elected not to pay for these services, but in 1920(6) to
15 facilitate them in the lesser manner of providing that a
16 party that incurred these expenses could recover them at
17 the end of the case if it won.

18 JUSTICE BREYER: What do you think of the --
19 I mean, the First Circuit dealt with this, which deals a
20 lot with Puerto Rico, and it felt that this fell within
21 the idea of fees for exemplification, which is
22 certifying the document. And in fact, to certify a
23 document that comes into the Federal court in San Juan,
24 you have to have it translated very often. And so, the
25 translation cost is at least consistent with the idea

1 there of trying to -- you may -- you don't have to --
2 you may impose the cost on the loser.

3 MR. FRIED: Well, Justice Breyer, there was
4 actually a specific provision in this bill, in a prior
5 version of this bill that addressed the context of
6 Puerto Rico. And the significance of that provision is
7 that when the Congress was addressing written
8 translation, which was part of the -- part of that
9 provision, it specifically used the word "translation"
10 to refer to that.

11 And this just, again, confirms that the
12 usual congressional practice of differentiating between
13 these terms in -- in statutes generally was fully
14 applicable here, that the Congress knew the difference
15 between these terms, used them appropriately, and the
16 fact that having removed that -- that provision from the
17 statute, the statute as passed contains only the words
18 "interpreter" and "interpretation," and no forms of
19 "translate" just again reaffirms that -- that the
20 ordinary meaning of these terms should apply.

21 JUSTICE GINSBURG: What of a document that
22 is -- that's read out in open court and the document is
23 a contract in another language, and the interpreter --
24 the witness presents the document and the interpreter
25 interprets it?

1 MR. FRIED: Your Honor, the professional
2 literature addresses this as sight interpretation or
3 sight translation, and it's uniformly recognized to be a
4 species of interpretation. It occurs -- the -- the
5 interpreter speaks aloud in the presence of the audience
6 being communicated to in the course of a spoken
7 proceeding.

8 JUSTICE GINSBURG: But what if the -- if the
9 interpreter, being diligent, said, I'm going to have to
10 translate this document in open court, I would like to
11 have it in advance so I can be sure that my translation
12 is going to be accurate, so that in fact the interpreter
13 looks at the document and in in preparation for the
14 trial translates it?

15 MR. FRIED: Well, Your Honor, I think that
16 the preparatory work that occurred outside of court
17 would not be compensable interpretation work. But when
18 the -- when the interpreter returned to court and gave
19 the oral interpretation of that document, that would
20 constitute interpretation.

21 CHIEF JUSTICE ROBERTS: But that -- but
22 she's not interpreting it. She's already got the thing
23 in whatever language, English, I guess. But I mean,
24 she's not interpreting, she's reading the English
25 translation.

1 MR. FRIED: That's true, Mr. Chief Justice.
2 But the key reason why that would constitute
3 interpretation is because the -- the interpreter is
4 speaking aloud, communicating in the course of a spoken
5 conversation to an audience who -- who doesn't speak
6 English or --

7 CHIEF JUSTICE ROBERTS: Oh, I misunderstood
8 the hypothetical, then. I'm sorry.

9 MR. FRIED: Perhaps I did, Your Honor. I
10 apologize.

11 CHIEF JUSTICE ROBERTS: I thought it was a
12 situation where you have got a -- a -- a document in --
13 in, say, French and the person translates it, or
14 interprets it -- I don't want to prejudge the issue --
15 and -- and then in English and then the person reads the
16 English thing in -- in court. That's not interpretation
17 at any point, is it?

18 MR. FRIED: Well, Your Honor, I think that
19 the literature does typically class the in-court oral
20 communication of its content as a form of
21 interpretation. But any ambiguity on this point
22 really -- really doesn't -- doesn't affect anything in
23 practice. I mean, any sight interpretation occurs as a
24 brief interval in a larger proceeding.

25 JUSTICE KENNEDY: Well, is it true that as a

1 matter of common usage, when we are talking about oral
2 testimony in court we often use "interpretation" and
3 "translation" or "interpreter" and "translator" somewhat
4 interchangeably, but when we're talking about rendering
5 a document into a -- into a different language, we
6 generally talk about that as "translation." This is a
7 matter of common usage. Do you think that's correct?

8 MR. FRIED: If I understand Your Honor
9 correctly, yes. I think that the ordinary meaning of
10 "translate" applies to the context of -- the
11 communication of information in written documents. And
12 it's -- it's discrete from "interpretation," which --
13 which is limited to --

14 JUSTICE SCALIA: Well, you didn't understand
15 the question.

16 JUSTICE KENNEDY: That wasn't quite my
17 point.

18 MR. FRIED: I'm sorry.

19 JUSTICE KENNEDY: My point was that I think
20 we say -- in fact, in a Supreme Court case, we said in
21 the Hernandez case, when we're talking about oral
22 testimony in Court, we tend to use "translator" or
23 "translate" and "interpreter" and "interpret" somewhat
24 interchangeably. Is that correct?

25 MR. FRIED: I apologize, Your Honor. Yes,

1 you can use the word "translate" generically. There's
2 no question. Frequently in court, and I think out of
3 court as well, that some people can use the word
4 "translate" in a manner that doesn't differentiate
5 between modes. Our point is that -- that double meaning
6 doesn't apply to "interpreter," which has a single
7 narrow meaning limited to spoken communication.

8 And Kan Pacific's discussion of the
9 dictionaries is limited to a single dictionary,
10 Webster's Third. The majority of dictionaries
11 categorically exclude document translation from the
12 scope of --

13 JUSTICE SCALIA: Webster's Third, as I
14 recall, is the dictionary that defines "imply" to mean
15 "infer" --

16 MR. FRIED: It does, Your Honor --

17 JUSTICE SCALIA: -- and "infer" to mean
18 "imply."

19 It's not a very good dictionary.

20 (Laughter.)

21 MR. FRIED: Well, the Court in the -- in the
22 MCI v. AT&T case did indicate that.

23 But -- but in any event, the -- on its
24 terms, that definition supports our reading over Kan
25 Pacific's because it does indicate, even as to that

1 dictionary definition, that the most common meaning of
2 the term is the meaning referring to spoken
3 communications. And this Court frequently looks to the
4 most common meaning for purposes of statutory
5 interpretation, as it did in *Mallard* in construing the
6 word "request," and in *Ramsey* in construing the word
7 "envelope."

8 JUSTICE SOTOMAYOR: Could we get back to the
9 issue. In the legislative history of this provision, is
10 there any indication that Congress explicitly rejected
11 translation work from its coverage?

12 MR. FRIED: I can talk -- there's a -- the
13 text does. The -- the text --

14 JUSTICE SOTOMAYOR: Outside of the text. Is
15 there a statement by one of the sponsors in the
16 congressional bill?

17 MR. FRIED: I'm not -- I'm sorry.

18 I'm not sure that there's an explicit
19 statement that I'm aware of in the legislative history.
20 There's a lot of provisions in the legislative history
21 which plainly presuppose that. And the Congress
22 received professional literature from -- documents from
23 the American Association of Language Specialists.

24 JUSTICE SOTOMAYOR: Those are the other
25 provisions that they passed with respect to --

1 MR. FRIED: Specifically with respect to
2 costs, the Congress -- the House Report alludes to Rule
3 43(f), which is now 43(d), as a relevant preexisting
4 rule. And of course, it's undisputed that Rule 43(d)'s
5 cost provision is -- is limited to spoken communication
6 of interpreters. So there is that in the history as
7 well.

8 But -- but I think that there's no doubt
9 that under the text of the statute, subsection (k) the
10 modes subsection, which appears at page 5a of the red
11 brief appendix as it was initially passed, expressly
12 says that the interpretation under -- under this section
13 must be done by using methods that all agree are limited
14 to spoken communication.

15 Now, in the --

16 JUSTICE SOTOMAYOR: So if a lawyer sits down
17 with an interpreter now in his office and says to the
18 interpreter, "I can't pay for translation work. Now,
19 you sit here and interpret what this letter says for
20 me."

21 Is that what we're asking lawyers to do
22 now --

23 MR. FRIED: Not at all, Your Honor.

24 JUSTICE SOTOMAYOR: -- if we accept your
25 reading?

1 MR. FRIED: No, Your Honor. That would not
2 constitute interpreting, because it would not -- the
3 interpreter would not be communicating between live
4 parties in the context of a real-time proceeding.

5 JUSTICE SOTOMAYOR: But you would say that
6 might be different in a courtroom.

7 MR. FRIED: Well --

8 JUSTICE SOTOMAYOR: Because the lawyer is
9 communicating something live. It could be in the
10 courtroom, but not outside.

11 MR. FRIED: That -- that's correct, Your
12 Honor.

13 JUSTICE SOTOMAYOR: Is there something
14 logical about this?

15 MR. FRIED: Yes, Your Honor, because in the
16 courtroom, in the context of a live spoken proceeding,
17 that satisfies all of the ordinary definitional elements
18 of interpreting. But that's not the case in somebody's
19 office in the presence of a single party and a written
20 document.

21 And -- and there's no question, Your Honor,
22 that to the extent there's any ambiguity with respect to
23 unusual examples, this is a distinction that's
24 absolutely clear in the vast majority of real world
25 incidents.

1 JUSTICE GINSBURG: What about depositions?

2 The translation would be of the spoken word, but it
3 wouldn't be in court.

4 MR. FRIED: Well, I do think there -- one
5 could potentially argue that spoken interpretation at a
6 deposition isn't covered, in light of some of the
7 dictionaries like Black's Law Dictionary, which
8 indicates that the word is restricted to people who work
9 in trial. But I certainly think that it could be argued
10 either way, in a case where --

11 JUSTICE KENNEDY: Well, what's -- what's
12 your position? I -- I take a deposition in my law
13 office and I have to have an interpreter there. Is that
14 recoverable or not?

15 MR. FRIED: I'm not sure we have a
16 definitive -- I think you could argue it either way,
17 Your Honor. It doesn't affect our case.

18 JUSTICE KENNEDY: Well, how do you think it
19 affects the way you read the statute? What do you think
20 should be the result?

21 MR. FRIED: I think there's a reasonable
22 reading that that should be covered. I think that's
23 certainly -- we have no vested interest in opposing
24 that.

25 JUSTICE KENNEDY: Let me ask you this

1 question: In the background here, is there some concern
2 that we're going to have minor cases but with huge
3 translation costs, and it would be simply unfair? And
4 if the answer to that is yes, isn't that taken care of
5 by the statutory direction that the Court "may" give
6 costs?

7 MR. FRIED: Well, Your Honor, that sort of
8 discretion demonstrably does not prevent the issuance of
9 these large awards, because there have been a number of
10 large awards issued notwithstanding that discretion.

11 JUSTICE KENNEDY: Well, isn't that an abuse
12 of discretion?

13 MR. FRIED: Well, not necessarily, Your
14 Honor. The -- the district courts --

15 JUSTICE KENNEDY: Well, I mean, in other
16 words, if the court sees that the -- the cost of
17 preparing documents into an English language is quite
18 substantial in light of what's involved in the case, and
19 it's just not fair to award them, can't that court in
20 its discretion deny them, or is that not the way it
21 works?

22 MR. FRIED: That's the way it works, Your
23 Honor. But I don't think that that discretion is
24 sufficient to eliminate the deterrent effect that this
25 court has recognized in cases like Farmer and

1 Fleischmann, because it occurs at the end of the case,
2 after a litigant has already decided whether to bring
3 suit. The deterrent effect occurs ex ante when a
4 risk-averse litigant has to decide whether to bring the
5 case.

6 But I -- I would just note that these sorts
7 of policy questions, Your Honor, arise in the context of
8 language that by its terms extends to interpreting and
9 not translating. And we would say that the relevant
10 policy question is simply whether there are sensible
11 reasons to -- that Congress may have drawn a line where
12 it did. And plainly, there are adequate reasons that
13 these services, document translation services that were
14 excluded, are potentially large and fall under the
15 general principles that this Court has recognized are --
16 are presumptively not frequently avoided --

17 JUSTICE SOTOMAYOR: I guess I'm -- I'm
18 having a problem with they're "potentially large."
19 Interpretive services are potentially large, although
20 you claim that they don't -- they have sort of a
21 terminus point. I've been in trials where we've had
22 multiple languages simultaneously being translated to
23 multiple defendants, with witnesses speaking even other
24 languages. I was in the Southern District of New York.
25 And fees there without translation, just for the oral

1 courtroom work, sometimes went ahead for months.

2 So potentiality's not the question. If
3 you're talking about disproportionality, then that goes
4 to the word "reasonable" in the statute, doesn't it? I
5 mean, the Ortho case you point to, the court did sizably
6 cut the translation fees. And more importantly, from
7 the little I can tell, that was a huge patent case with
8 a patent that was claimed to control 60 percent of a
9 market.

10 So I don't know that that was a small case
11 by anyone's definition.

12 MR. FRIED: Certainly, Your Honor.

13 As to the difference, I mean, I'm not aware
14 of -- under this statute, an interpreter's spoken
15 interpretation award approaching anywhere near some of
16 the larger document translation awards that have been
17 issued. But nonetheless, I am not denying that there
18 could be large interpreter awards in some cases. But
19 the fact is that adding on document translation awards
20 is additive.

21 The sort of necessity review that would be
22 necessary to police these document translation awards
23 would be quite burdensome on the district courts. And
24 in fact, the necessity standard is actually translation
25 awards is additive. The sort of necessity review that

1 would be necessary to police these document translation
2 awards would be quite burdensome on the district courts,
3 and in fact the necessity standard is actually
4 particularly problematic to apply to translations, Your
5 Honor, because the fact is you don't know what a
6 document says until it has been translated. And the
7 exercise of trying to go back and reconstruct ex ante
8 what a -- whether a person was reasonably necessary in
9 causing to be translated something that they didn't know
10 what it meant is likely to lead to very subjective --

11 JUSTICE BREYER: Well, I haven't --I was
12 interested here that the amici on your side consists of
13 some professors and the, I guess the trade associations
14 of interpreters or translators, but the people who would
15 have the financial stake in it, the defense bar, the
16 plaintiff's bar in certain circumstances, have not filed
17 any brief. And I tend, though not putting a lot of
18 weight on it, to take it as a sign, along with the long
19 period of time, that there hasn't been some tremendous
20 financial problem. What evidence is there that there
21 has been? I see a few cases, but in general.

22 MR. FRIED: Your Honor, I am not at all
23 suggesting that there has been a tremendous financial
24 strain on the system. We are saying that this is a
25 statute that, by its plain language, extends to --

1 JUSTICE BREYER: The plain language argument
2 I got. But how many years has the great bulk of the
3 court been going the other way?

4 MR. FRIED: I'm sorry, Your Honor, I
5 actually, I didn't hear the end of your question.

6 JUSTICE BREYER: How many years has, would
7 you say, the great bulk of the Federal system been
8 deciding this differently from the way you think it
9 should be?

10 MR. FRIED: I'm not sure that it is the
11 great bulk. I mean, there's been a
12 significant disagreement--

13 JUSTICE BREYER: That's the bulk.

14 MR. FRIED: Well, I think it's -- I think
15 that it's increased over time.

16 JUSTICE BREYER: Well, when did all this rot
17 set in, in your opinion. How long?

18 MR. FRIED: I'm not sure that I could
19 pinpoint a date, Your Honor.

20 JUSTICE BREYER: When is the first one?

21 MR. FRIED: Your Honor, I'm not sure. I
22 will have to find out while my adversary is arguing what
23 the first decision was.

24 JUSTICE SOTOMAYOR: As far back as 19 -- It
25 was a district court. But it was as far back as the

1 1930s. Some in the '40s, some in the '50s.

2 MR. FRIED: Certainly it wasn't construing
3 1920(6) at that time, Your Honor.

4 JUSTICE SOTOMAYOR: No, no. Clearly. But
5 these awards have been common.

6 MR. FRIED: Your Honor --

7 JUSTICE BREYER: You have a case cited from
8 1812. I take it that's it?

9 MR. FRIED: Certainly, Your Honor. Um,
10 addressing --

11 JUSTICE SCALIA: I thought -- I thought we
12 were addressing not whether it's a good idea to give
13 fees, but whether fees are payable under this particular
14 statute, right? Which was enacted when?

15 MR. FRIED: 1978, Your Honor.

16 JUSTICE SCALIA: 1978. That's not so long
17 ago.

18 MR. FRIED: Absolutely correct, Your Honor.
19 We agree. And the structural reasons are -- within the
20 Court Interpreters Act itself are every bit as powerful
21 as the ordinary textual indicia that support our
22 reading. And in fact Kan Pacific's argument that the
23 word "interpreters" should be assigned different
24 meanings in different parts of the statute is -- is
25 unsupported.

1 Kan Pacific relies on what it characterizes
2 as different language in section 2, which put in 1827
3 and 1828, and section 7, which put in the cost
4 provision. And it notes that section 2 sometimes uses
5 the broader phrase "interpreters in courts of the United
6 States," whereas section 7 uses the word "interpreters"
7 alone.

8 But Kan Pacific doesn't examine the context
9 in which section 2 does and does not use that broader
10 phrase. And those specifics really undermine any
11 argument one might make along those lines. As
12 originally passed in section 2, 1827 contains 26
13 occurrences of the word "interpreter," not counting the
14 title. And of those 26 cases, 24 simply use the word
15 "interpreter" by itself. So there is certainly at the
16 very threshold no overarching pattern of usage
17 distinction between them.

18 More fundamentally, though, the substantive
19 provisions addressing the use of interpreters by parties
20 in these cases in 1827 do so without using that broader
21 phrase. Subsection (d) --

22 JUSTICE SCALIA: Do so without --

23 MR. FRIED: I'm sorry, Your Honor. Without
24 using the broader phrase "in courts of the United
25 States."

1 Subsection (d) is the provision that -- that
2 governs the use of interpreters in cases brought by the
3 government. This appears at page 2a of the red brief
4 appendix, and it simply provides that upon a
5 determination of need, the services of an interpreter
6 will be used in these cases.

7 The only two provisions that use the phrase
8 "interpreters in courts to the United States" are
9 subsections (a) and (b), which are both at 1a of the red
10 brief appendix, and both of these provisions -- are
11 addressing the scope of the Administrative Office's
12 duties under the statute. And as such, it simply makes
13 clear that, in keeping with the office's ordinary
14 function, it's -- it's facilitating the work of the
15 Federal courts and making clear that the offices -- and,
16 for instance, certifying interpreters for the State
17 courts.

18 So nothing in this language suggests in any
19 way that the -- that the word "interpreter" means
20 something different in different places or that the
21 services of an interpreter are viewed as embracing the
22 same thing.

23 So we think that a variety of indicia of
24 meaning converge in this case to support the conclusion
25 that 1920(6) is limited to spoken communication.

1 If there are no further questions, I will
2 reserve the balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Fried.

5 Mr. Himmelfarb.

6 ORAL ARGUMENT OF DAN HIMMELFARB

7 ON BEHALF OF THE RESPONDENT

8 MR. HIMMELFARB: Thank you,
9 Mr. Chief Justice, and may it please the Court:

10 The word "interpreter" has two possible
11 meanings that are relevant here, a broader one and a
12 narrower one. The broader meaning is a person who
13 translates from one language to another. Under this
14 definition the terms "interpreter" and "translator" are
15 used interchangeably.

16 JUSTICE SCALIA: Have you ever seen a book,
17 you know, translated from a foreign language, you know,
18 "War and Peace," you know, and you are at the mercy of
19 what we call the translator, and it says on the fly
20 page, you know, "John Smith," comma, "Trans.," period.
21 Does it ever say "John Smith," comma, "Int.," period?

22 MR. HIMMELFARB: It is used in the narrower
23 sense in that context, I think, Justice Scalia. The
24 narrower meaning of "interpreter" is member of a
25 profession that specializes in oral translation; and in

1 that narrower sense, an interpreter is distinct from a
2 translator, which is the sense you've just identified,
3 which is a person who specializes in written
4 translation.

5 Our submission is that, as the great
6 majority of courts who have expressed a view on this
7 question have recognized, the broader definition makes
8 more sense in the particular context at issue here. And
9 we say that for a number of reasons.

10 The first is that the basic purpose of
11 translation in the litigation context is to make
12 evidence intelligible to the parties and the court.
13 Section 1920 reflects the congressional judgment that
14 the cost of making evidence intelligible to the parties
15 and the court can be borne by the losing party.

16 JUSTICE SCALIA: No, it doesn't. It
17 reflects that judgment only if you are right that
18 "interpreter" means "translator."

19 MR. HIMMELFARB: Well --

20 JUSTICE SCALIA: I mean, you are begging the
21 question. You could say that the one should embrace the
22 other. But whether Congress thought that or not is
23 mostly dependent on the language Congress used, isn't
24 it?

25 MR. HIMMELFARB: Well, let me be as clear as

1 I possibly can. I'm obviously not standing here saying
2 we lose under the language, but it would be a good idea
3 for the statute to cover written translation. That's
4 not a legitimate enterprise for a court interpreting a
5 statute.

6 What I'm saying is that the text of the
7 statute bears two -- permissibly bears two possible
8 meanings. That being the case, it is a legitimate
9 enterprise for the Court to say which makes sense, which
10 is it most likely that Congress would have intended in
11 this particular context?

12 JUSTICE ALITO: Why does your interpretation
13 make sense? Shouldn't we view this against the backdrop
14 of the American rule on fees, that each party generally
15 bears its own costs and only in specific circumstances
16 does the loser pay? Now, the taxation of costs is a
17 very narrow concept.

18 What is the difference between a case in
19 which a lot of documents have to be rendered from one
20 language to another prior to the court proceeding and a
21 case in which there is a mass of scientific evidence
22 that has to be interpreted by a scientist? Or financial
23 evidence that has to be interpreted by an accountant?
24 In those instances, the losing party doesn't pay for the
25 winner's expenses, does it?

1 MR. HIMMELFARB: Well, let me -- let me
2 address the first part of your question first, which is
3 essentially, as I understand it, isn't there a
4 background principle that says costs don't get taxed? I
5 actually think insofar as far as tax -- costs are
6 concerned, as distinct from attorney's fees, the
7 background principle actually goes the other way.

8 JUSTICE ALITO: Back up. Costs get taxed,
9 but costs are very narrow and they are a very small part
10 of the expenses of a party litigating a case. Isn't
11 that -- isn't that true?

12 MR. HIMMELFARB: I think ordinarily that is
13 true, but I don't think that it follows, it follows in
14 any way, that there is some sort of tie-breaking
15 interpretive canon that says when you are interpreting
16 the costs statute, some version of which has been in
17 effect since the middle of the 19th century, if you are
18 unsure about the scope of it, that you err on the side
19 of narrowness rather than breadth. I just don't think
20 there is any such interpretive principle.

21 JUSTICE KAGAN: Well, aren't you asking for
22 an interpretive principle that errs on the side of
23 breadth rather than narrowness?

24 MR. HIMMELFARB: No, we don't.

25 JUSTICE KAGAN: Why don't we just ask

1 ourselves what's the most common, what's the best
2 reading?

3 MR. HIMMELFARB: Well, I think you obviously
4 have to start there in this case, as you do in any
5 statutory case; and our submission is that you have two
6 possible ordinary definitions. You have two possible
7 common usages.

8 JUSTICE KAGAN: But the dictionaries
9 themselves tell us that one usage is far more common
10 than the other.

11 MR. HIMMELFARB: I mean, I guess I just have
12 to dispute that. We have Webster's, which, you know,
13 Justice Scalia's view notwithstanding, is viewed by many
14 people as an authoritative dictionary of English
15 language. We have got Black's Law Dictionary which I
16 think everyone agrees is the leading law dictionary,
17 which provides as a definition of "interpreter" the
18 broad definition that we advocate here. To be sure --

19 JUSTICE SCALIA: Well, I guess Black's Law
20 Dictionary which -- the editor of it is a -- is
21 co-author with me, so I -- I feel obliged to spring to
22 his defense --

23 (Laughter.)

24 JUSTICE SCALIA: Since it is a law
25 dictionary, presumably it ought to have taken into

1 account the cases you are referring to, many of which
2 use the word in -- in this sense, right?

3 MR. HIMMELFARB: That's true.

4 JUSTICE SCALIA: Like Garner.

5 MR. HIMMELFARB: That's absolutely true, and
6 just as a dictionary, a law dictionary will take those
7 cases into account, I think it's ordinarily presumed
8 that Congress is taking into account the cases, too, and
9 it's taking into account dictionary definitions as well.

10 CHIEF JUSTICE ROBERTS: One -- one of the
11 things that concerns me is the impact of -- of cost
12 allowance on the normal litigation incentives. An
13 interpreter in court is one thing. When you suddenly
14 get a situation where the costs could be quite large,
15 particularly in a -- in a disparate way, not necessarily
16 shared by both sides; somebody goes into court; they
17 know they are going to have to -- if they lose, they
18 will have to pay the interpreter this; and the other
19 side comes in and says well, we think we need to submit
20 this 10,000 pages of -- of documents, which will have to
21 be translated and by the way, if you lose you are going
22 to pay for that.

23 In other words, it is a much more variable
24 element of costs than the interpreter.

25 MR. HIMMELFARB: I -- I'm not sure that's

1 true. I think in large litigations where you have many,
2 many days of trial and potentially pretrial proceedings,
3 you could have very large oral translation costs. Where
4 there are many depositions, you could have large oral
5 translation costs.

6 But even if I were to accept the premise of
7 your question, it seems to me that the way these costs
8 get controlled is through the exercise of district
9 court's discretion, not to tax every -- the cost of
10 translating every document. The Fifth Circuit, which is
11 one of the --

12 CHIEF JUSTICE ROBERTS: So what -- so what
13 goes into the exercise of that discretion?

14 MR. HIMMELFARB: Well, typically the
15 criteria for -- I should add, the criteria for taxing
16 costs of every sort, not just interpreter costs and not
17 just document translation costs, are essentially thought
18 to be necessity and reasonableness. So in connection
19 with document translation costs, the Fifth Circuit has
20 suggested that the way to tax them, the appropriate way
21 to tax them might be just to tax the cost of translating
22 headings of foreign language documents, which should be
23 sufficient to let the lawyer know whether this is a
24 relevant document that might bear further translation,
25 and then only the documents that really turned out,

1 based on the translation of the heading, to have some
2 significance to the case. So that's just one example of
3 the way the discretion gets exercised.

4 JUSTICE GINSBURG: Mr. Himmelfarb, in
5 section 1920, there are two provisions that specify
6 costs necessarily obtained for use in the case. And the
7 interpreter provision doesn't have that qualification,
8 doesn't say necessarily obtained for use in the case.

9 MR. HIMMELFARB: That -- that's true.
10 For -- for --

11 JUSTICE GINSBURG: You are asking to read
12 interpreter means to mean translator as well, and to
13 import into sub (6) "necessary for use in the case."

14 MR. HIMMELFARB: The necessity limitation in
15 subsection (6) as with other subsections that don't
16 specifically use the word "necessarily" come not from
17 that term, but rather from the word "may" in the first
18 sentence of the provision, which in tandem with Rule 54
19 of the Federal Rules of Civil Procedure, essentially
20 make this a discretionary call for the district courts.
21 Necessity has long been recognized as one of the
22 components of that discretionary determination.

23 The reason we say it doesn't make sense to
24 have the narrower definition of interpreter be the one
25 that Congress enacted is that written document

1 translation can be and often is every bit as important
2 as oral translation. In many cases, it could be more
3 important, in a contract case, for example.

4 JUSTICE BREYER: What do you think on the --
5 I guess nobody wants to defend this argument, including
6 you, but the First Circuit and several others did look
7 to the provision which permits the taxing of costs with
8 the making of specific exemplifications or official
9 documents, for the costs of making copies of any
10 materials obtained for use in the case.

11 Now, if you are going to make a copy for use
12 of the case of something in Japanese, you are going to
13 have to turn it into English. So they included that as
14 part of the costs of making copies of the materials and
15 documents for use in the case. Now, which is
16 discretionary; it's whether you do or whether you don't.
17 But that's how several courts could read it. I am just
18 wondering, that didn't strike me as so obviously wrong.
19 Maybe it's obviously --

20 MR. HIMMELFARB: Well, I mean, I suppose it
21 goes without saying that we would rather win under
22 subsection (4) than lose under subsection (6). There
23 are --

24 JUSTICE BREYER: I am sure you would like to
25 win on any subsection.

1 (Laughter.)

2 MR. HIMMELFARB: That's true, absolutely
3 true.

4 There are some courts that have suggested
5 that document translation fits under subsection (4). I
6 think those that have done so have tended to do it --
7 tended to do it before section (6) was added in 1978.
8 We haven't --

9 JUSTICE BREYER: All right. So the history
10 is that prior to '78 a serious number -- some number of
11 circuits said you can get the translation paid for
12 under -- as -- as being necessary to create a copy that
13 is usable in court. All right. Then Congress passes,
14 this knowing of those cases in principle, and then there
15 is a shift after Congress passes this, and then the
16 majority of courts say, all right, this is the provision
17 that permits it. Is that an accurate statement?

18 MR. HIMMELFARB: I think that is accurate.
19 Before 1978 some of the courts that taxed document
20 translation costs I believe also relied on their
21 inherent authority, which at the time was thought to be
22 a permissible ground for taxing costs.

23 JUSTICE BREYER: Is there anything in the
24 history of the '78 statute which suggested that Congress
25 didn't want these taxed?

1 MR. HIMMELFARB: Absolutely not. There
2 is -- there is frankly nothing in the legislative
3 history of the Court Interpreters Act really that bears
4 on this issue one way or another. There is a lot of
5 legislative history on which Petitioner relies, but it's
6 all addressed to section 2, which is a separate
7 provision which deals with a separate subject, which is
8 the appointment of interpreters in cases initiated by
9 the United States.

10 JUSTICE SCALIA: So if there is no
11 legislative history -- there's -- legislative history on
12 the other side either, right? Saying that we -- we mean
13 this to include --

14 MR. HIMMELFARB: No, that's right. We
15 don't -- we --

16 JUSTICE SCALIA: So, absent legislative
17 history, I guess we have to rely on the words of the
18 statute, right?

19 JUSTICE BREYER: That means you don't have
20 to look at this.

21 MR. HIMMELFARB: I guess I just go back to
22 where I started, which is that we think under dictionary
23 definitions and under common usage there are two
24 permissible meanings of interpreter.

25 CHIEF JUSTICE ROBERTS: Well, there are

1 two -- there may be two permissible, but you don't
2 dispute the fact that it is more natural and common to
3 speak of someone interpreting oral communication and
4 someone translating written, correct?

5 MR. HIMMELFARB: I don't -- I -- I think I
6 would dispute it. I don't know whether one is more
7 common than the other in any meaningful way. It may be
8 slightly more common to use it in its narrower sense to
9 refer to a member of a profession, but it certainly is
10 common enough that you have district judges from all
11 over the country in written opinion just sort of
12 matter-of-factly talking about the people who translate
13 documents as interpreters.

14 JUSTICE KAGAN: Well, how about in the U.S.
15 Code? Is there any place in the U.S. Code where the
16 word interpreters clearly encompasses written
17 translators?

18 MR. HIMMELFARB: I'm not aware of any.
19 There aren't -- there -- I frankly don't think there are
20 that many places in the United States Code where the
21 term "interpreter" is used other than in its sort of
22 obvious, narrowest sense based on the context of a
23 statute. So, for example, a number of statutes talk
24 about funding translators and interpreters who are not
25 citizens of the United States. It seems to us that in

1 that context what Congress is getting at is the
2 interpreter and translator in the narrower sense of
3 members of a profession.

4 JUSTICE KAGAN: So in every other case where
5 the U.S. Code uses the word "interpreters" means only
6 oral translators, and that's the obvious way to use the
7 word, but in this case we are supposed to reach a
8 different conclusion?

9 MR. HIMMELFARB: Justice Kagan, I would say
10 this, in every other provision of the United States Code
11 in which the interpreter -- the word "interpreter" is
12 used, either it's not clear whether it includes document
13 translation or the context is such that it strongly
14 indicates that it's limited to oral translation. And
15 neither of those situations obtains here, in our view.

16 CHIEF JUSTICE ROBERTS: Let me rephrase your
17 answer a different way. You are not -- you don't know
18 of any situation in the U.S. Code where translators --
19 or the interpreter means translator?

20 MR. HIMMELFARB: I am not aware of any other
21 provision in the United States Code.

22 CHIEF JUSTICE ROBERTS: And you checked
23 every one, so there is none, right?

24 (Laughter.)

25 MR. HIMMELFARB: There is -- there is none

1 where it is clear that it covers document translation.

2 There are -- there are State statutes which we have
3 cited which use the term "interpreter" to -- to clearly
4 cover document translation, and we cite them in our
5 brief.

6 JUSTICE ALITO: Somebody did a computer
7 search in the database of, let's say, newspaper articles
8 and magazine articles for use of the term "interpreter"
9 in relationship to a foreign language. And let's say
10 you look at 1,000 hits.

11 How many of those do you think would use the
12 term "interpreter" to refer to rendering a written
13 document from one language to another?

14 MR. HIMMELFARB: I would not be at all
15 surprised if it was more than 50 percent of the hits
16 that used it in its narrower sense.

17 JUSTICE SOTOMAYOR: You are like daring
18 Justice Alito to go do this now.

19 (Laughter.)

20 MR. HIMMELFARB: However --

21 JUSTICE ALITO: How much would you bet?

22 (Laughter.)

23 JUSTICE ALITO: If you bet me enough, I will
24 look at 1,000, I would be surprised if it's 2 percent.

25 MR. HIMMELFARB: I couldn't venture a guess,

1 and I would rather not bet you.

2 (Laughter.)

3 MR. HIMMELFARB: I do want to say something
4 about the concept of sight translation, which is
5 something that my friend Mr. Fried averted to. Sight
6 translation is a hybrid endeavor. It is the oral
7 translation of written documents.

8 One of the reasons we think that the broader
9 meaning of interpreter makes more sense in section 1920
10 is that it can't really account in any sensible way for
11 sight translation. In this case, for example, our
12 counsel -- Kan Pacific's counsel took Taniguchi's
13 deposition. And to prepare for the deposition, he
14 reviewed -- he had to review some contracts which were
15 written in Japanese and some medical records which were
16 written in Japanese.

17 Now, under our view, having those documents
18 translated in writing to prepare for the deposition,
19 would result in a potentially taxable cost. Under
20 Taniguchi's view, they wouldn't. But it sounds like
21 under either party's view, if instead of handing those
22 documents off to a document translator to have them
23 translated in writing, he had sat down in his law office
24 with a member of the interpreter profession and said
25 here's a box of documents, please, tell me what they

1 say. That would potentially be a taxable cost. That
2 seems to me to be a very odd result and one that's --

3 CHIEF JUSTICE ROBERTS: It's an odd result
4 because nobody's going to do it. Because at that point
5 you don't know who is going to get saddled with the
6 cost. So it wouldn't be likely that you would do
7 something that would increase the costs, would it?

8 MR. HIMMELFARB: Well, I don't know that it
9 would increase the costs. It may be cheaper to use an
10 oral translator -- an -- an oral translator as opposed
11 to a written document translator. And there might be a
12 variety of reasons why you would choose to use one or
13 another, time constraints, the importance of the
14 particular document, what have you. But I don't think
15 that it's likely that Congress would have thought that
16 the potential taxability of the translation --

17 JUSTICE SCALIA: Is it -- is it clear? Does
18 anybody contend -- does the other side contend that the
19 use of a viva voce translation outside of court is
20 covered by the meaning of interpreter here. I assume
21 the interpretation here meant interpretation in the oral
22 proceeding that is the trial.

23 And you are -- you are saying that if we
24 hold against you, interpretation will still include all
25 oral translations outside of the trial.

1 MR. HIMMELFARB: Well, I think every court
2 that's ever thought about this has found that
3 deposition -- oral translation at deposition --

4 JUSTICE SCALIA: At deposition, which I
5 consider part of the -- part of the trial process, but
6 not -- not in the lawyer's office where he asks somebody
7 to sit down and -- and read this document to me.

8 MR. HIMMELFARB: Well, there's -- I don't
9 see any basis in the statute or, frankly, in the
10 practice of translators or interpreters of drawing that
11 line in that particular place.

12 And as far as the question of where
13 Taniguchi would the Court -- Court draw its concern, I
14 think that is a very hard question to answer, because he
15 has moved back and forth so many times on that. His
16 briefs offer several different -- several different
17 narrower definitions of interpreter, sometimes saying
18 it's the oral translation of oral speech. Sometimes
19 saying it's the oral translation of any language,
20 whether it's oral or written. Sometimes saying it's
21 limited to in-court interpretation. Sometimes it's
22 saying it's not.

23 That, it seems to us, is a very good reason
24 for adopting the broader interpretation. It seems very
25 unlikely that Congress would want courts to get into

1 these extremely complicated and, frankly, unprincipled
2 line drawing exercises.

3 JUSTICE KAGAN: I don't know,
4 Mr. Himmelfarb. Why is this any -- any different from
5 than any other case in which we draw the line, and we
6 find that the result of drawing the line is that we have
7 created some close cases, cases that are near the line.

8 So, you know, just to give you an obvious
9 example, the fact that there are some few minutes in
10 every 24-hour period where's it's hard to say that
11 something is night or day does not mean that there is no
12 night and that there is not day. And that seems to me
13 what the question is here. Here you can think of some
14 hard cases, but they are just that, they are marginal
15 cases.

16 MR. HIMMELFARB: I think -- I think line
17 drawing is sometimes a necessary exercise because the
18 text of the statute compels you to do it. Our
19 submission is that the text of this statute doesn't
20 compel it, because you have a readily available
21 alternative interpretation which doesn't require any
22 sorts of these line drawings.

23 And as far as whether this is sort of a --
24 an outlying -- the examples I give are outlying oddball
25 circumstances goes, I don't think they are. Sight

1 translation, for example, is a core function of
2 interpreters and translators alike.

3 And I guess the only other point I would
4 say -- make about sight translation, my friend,
5 Mr. Fried suggested that that -- that is something that
6 could only be covered if it takes place during the
7 course of live proceedings, which I think is yet another
8 narrowing of the word "interpreter." But as far as I am
9 aware, most sight translation is little, if any, sight
10 translation actually occurs during the --

11 JUSTICE BREYER: I accept the following,
12 that there was a history basically giving -- doing what
13 you want before the statute, but the statute, nobody
14 thought, was going to do that history, that statute is
15 capable of being translated but it is a most natural
16 thing.

17 And so, the question is, do we take -- go
18 with the smaller capabilities and leave well enough
19 alone or do we say, gee, that is just too hard to
20 translate that -- to interpret the statute that way.

21 Have you got any other examples in the law?
22 I mean, can you think of an example in the law which I
23 have been trying to think of where there was a history
24 of doing something?

25 The statute comes along that makes it a

1 little tougher for the judges to do it. And then the
2 court says either, sorry, too tough now, or it says let
3 sleeping dogs lie.

4 MR. HIMMELFARB: Well, I think -- I mean, I
5 think it is an important point. And this goes to the
6 question of, you know, whether it's difficult for
7 district courts to make a determination of whether a
8 particular document translation should be taxed, which
9 is one of the arguments on the other side. I think the
10 history of this is strong evidence that it's not
11 difficult.

12 Courts have been doing this, certainly,
13 since 1978 when this provision was added and even before
14 then. And they haven't had any evident difficulty in
15 deciding whether to tax documents in its document
16 translation, and if so, how much. So I think the -- the
17 history certainly bears on the case in that respect.

18 A word --

19 JUSTICE SOTOMAYOR: Justice Breyer is
20 asking, can you think of an example where words are not
21 on their face plain, and the court has looked to the
22 practices that have been impugned into that word
23 incentive and we decided that they will be accepted in
24 the way that practice has given them meaning?

25 MR. HIMMELFARB: I can't think of any case

1 off the top of my head, and I think it's true that this
2 case is a little bit different, because insofar as
3 courts were taxing document translation costs before
4 1978, they were relying on something other than the word
5 "interpreter." So it may be a stretch to say that when
6 Congress chose to use the word "interpreter," it was
7 necessarily incorporating what courts had previously
8 done.

9 But I don't think it's entirely irrelevant
10 that this has been done for a long time, and I think
11 it's not unfair to presume that Congress would have been
12 aware of that.

13 The Court Interpreters Act has two main
14 provisions as relevant here. There's section 2, which
15 is really the more -- the main provision -- and then
16 section 7, which became 1920(6) in Title 28, which is
17 the provision at issue here.

18 An important part of Taniguchi's submission
19 is that section 2 is limited to oral translators, and
20 therefore, it should follow that section 7, the
21 provision at issue here, is likewise limited to oral
22 translators.

23 And our main submission on that -- on that
24 question is that Congress actually used different
25 language in section 2 and section 7. Section 2 added

1 two provisions to Title 28: section 1827 and section
2 1828, which are titled, and which address, respectively,
3 interpreters in courts of the United States, and special
4 interpretation services.

5 In section 7, which added subsection (6) to
6 1920, Congress does not use those two phrases. Instead,
7 it uses the phrase "interpreters" simply, not
8 "interpreters in courts of the United States," and then
9 "special interpretation services."

10 So to the extent that there is any
11 appropriate canon about the use of similar or different
12 language in different provisions of a statute, it seems
13 to us that the appropriate canon is that one should
14 presume that when Congress uses different language, it
15 intends different meanings.

16 I do want to respond to Mr. Fried's point
17 about the number of times the word "interpreter" is used
18 in section 2. And as I understand his point, it's
19 that -- it's that it is much more frequently used by
20 itself than it is with the -- with the words "in courts
21 of the United States."

22 What the statute actually does is add -- say
23 that it's adding section 1827, which it calls
24 "interpreters in courts of the United States." It then
25 has a subsection that says that "the administrative

1 office of the United States court has to establish a
2 program to facilitate the use of interpreters in courts
3 of the United States."

4 CHIEF JUSTICE ROBERTS: Where are you
5 reading from?

6 MR. HIMMELFARB: I'm sorry, this is the red
7 brief, 1a of the appendix, which is the very beginning
8 of the Court Interpreters Act. And then there's
9 subsection (c), flipping over to the next page -- I'm
10 sorry, subsection (b) -- which says that "the director
11 has to certify interpreters in courts of the United
12 States."

13 So what it does at the beginning of the
14 statute is establish this thing called a certified
15 interpreter in courts of the United States. When it
16 thereafter speaks of interpreter simply, that's just a
17 shorthand for a certified interpreter in courts of the
18 United States. So it seems to us that as far as the
19 Court Interpreters Act is concerned, even if it's true
20 that section 2 uses the term in the narrower sense, it
21 doesn't necessarily follow that it's used in the
22 narrower sense in section 7.

23 And the only point I would add about that,
24 as we set -- point out in our brief, it's really not
25 clear that section 2 is limited to oral translators.

1 Soon after the Court Interpreters Act was
2 enacted, and for approximately 16 years thereafter, the
3 administrative office would publish these notices in the
4 Federal Register notifying the public that they were --
5 there were going to be certification exams for
6 interpreters under section 2 of the Court Interpreters
7 Act. These were pretty streamlined notices, not long at
8 all.

9 And one of the main aspects, the main
10 sections of the notice, was a list of what the director
11 of the administrative office said were the -- were the
12 duties of interpreters in courts of the United States.
13 And to be sure, it listed simultaneous and consecutive
14 interpreting, but it -- it listed sight translation and
15 it listed document translation.

16 So at a minimum, section 2 is not
17 sufficiently clearly limited to oral translators, that
18 the director of the administrative office couldn't issue
19 these notices saying otherwise.

20 I guess the -- the last point I want to make
21 about other statutes, some of which use the term
22 "interpreter" and "translator" together, I have already
23 addressed that in part by saying that in many of those
24 statutes, it really is pretty clearly used in the
25 narrower sense, because you're talking about members of

1 a profession.

2 The -- the only other thing I would say
3 about that is that the premise of Taniguchi's reliance
4 on those statutes seems to be that it would be strangely
5 redundant for Congress to speak in other statutes about
6 interpreters and translators together, if, in fact, the
7 two terms could be used interchangeably, and that
8 redundancy should be avoided.

9 But subsection (6) of 1920 itself has a
10 redundancy in it, because it covers both interpreters
11 and special interpretation services. And I don't think
12 anybody could dispute that anyone who carries out a
13 special interpretation service is an interpreter.

14 So it's not at all odd to have redundancy
15 when Congress is addressing the subject of translation.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Fried, you have 5 minutes remaining.

18 REBUTTAL ARGUMENT OF MICHAEL S. FRIED

19 ON BEHALF OF THE PETITIONER

20 MR. FRIED: Very briefly, Your Honor, three
21 points.

22 In the first place, Justice Breyer, I just
23 wanted to let you know that the first decision -- first
24 appellate decision construing 1920(6) to encompass
25 document translation was the D.C. Circuit's decision in

1 Lam Quy in 1981.

2 Second, Mr. Himmelfarb noted that Black's
3 Law Dictionary takes a definition that arguably could
4 encompass document translation, but he didn't mention
5 that the operative version of Black's in 1978 when this
6 statute was passed did not -- was a different definition
7 that excluded document translation.

8 And this change in the definition occurred
9 in 1999, in the seventh edition, after a number of these
10 judicial decisions construing 1920(6) had come down,
11 which supports Your Honor's observation that it could
12 very well merely reflect a recognition of these
13 decisions, rather than independent support for them.

14 Finally, Your Honors, Mr. Himmelfarb cited
15 certain notices issued by the administrative office from
16 many years ago. These brief notices were ministerial
17 documents that simply announced a forthcoming
18 examination. The office has issued the guidance to
19 judiciary policy, which is -- which is the fully
20 expressed views on this issue. And it's posted on the
21 office's website. It's current as of June 9, 2011 --
22 and expressly provides that document translation is not
23 a part of the statutory services of an interpreter.

24 If there are further questions, I'd be happy
25 to address them.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:11 p.m., the case in the
4 above-entitled matter was submitted.)

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